Committee on Resources

Witness Statement

Testimony Of
Marc Racicot, Governor of Montana
on behalf of
The Western Governors' Association
Before the House Resources Committee
On HR 3160, Common Sense Protection of Endangered Species Act

March 1, 2000

Mr. Chairman, Representative Miller, Members of the Committee. My name is Marc Racicot. I am Governor of the State of Montana and am here representing the Western Governors' Association. I appreciate the opportunity to share with you the Governors' perspectives on the Endangered Species Act (ESA).

Comprehensive reauthorization of the Endangered Species Act (ESA) in this Congress is the highest legislative priority of the Western Governors. We appreciate the Committee's efforts to fulfill this goal.

Our states and communities must deal with the effects of proposals to list species and management decisions made under the ESA on literally a daily basis. Recent salmon, steelhead, and bull trout listings affect nearly every watershed in the Pacific Northwest from tidewater areas to headwater streams in Montana. The prairie dog, which the Service has said is warranted but precluded for listing ranges over 11 western states. A listing decision on the lynx is scheduled for March and reaches from Portland, Oregon to Portland, Maine.

Unfortunately, listing under the act places a cloud of uncertainty over nearly every economic and social activity where the species may occur. As a result, our states, counties and local governments must consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to identify and develop best management practices for activities ranging from storm water discharges, to road design, to myriad land uses.

As equally unfortunate are the dynamics of present ESA impacts which stifle cooperative agreements and innovative ways to foster healthy populations. For instance, there is an inadequate number of effective federal-state partnerships which can lead to protective (4d) - rules. This lack of partnership reflects a lack of understanding of what should be understood as effective state and local government practices.

At the same time our farm and ranching communities are trying to learn what practices will comport with the protective (4d) - regulation for species listed as threatened, while our states and communities are coming together and marshaling their resources to reverse the declines in these species. Yet the two Services are not willing or have too few personnel to work with states and private landowners to incorporate creative solutions to meet the requirements of the ESA.

Similarly, Montana has encountered delays with our construction projects under the new highway act. The U.S. Fish and Wildlife Service does has not have the personnel to conduct the Section 7 consultations that are necessary before bridges and roads can be constructed in affected watersheds.

Rural communities and federal and state resource and land management agencies are reeling from the successive listing petitions that have been and are being prepared for each of the species that share the large landscapes of the West-like our prairies and sagebrush steppes, where prairie dogs and grouse are keystone species.

Under the current approach, successive petitions and settlement of legal challenges divert resources and impose deadlines that short-circuit state conservation efforts before they can be completed. This process, quite frankly, frightens away stakeholders who are interested in conserving the species. Yet, in nearly every case, these species spend the majority of their time on private lands. The decline of these species can not be reversed unless states and private landowners are made partners in achieving the goals of the Act.

These problems are compounded by the fact that landowners are not given the regulatory assurances and financial and technical assistance that they need to actively manage their lands for the benefit of declining species. Even where states have brought stakeholders together to address the threats to a species in conservation agreements, court decisions, which second guess a Secretary's approval of such plans, have set such agreements aside.

In short, our states need immediate, comprehensive improvements in the way the Endangered Species Act is implemented and funded. The intent of the Act remains a laudable goal. Yet the tools within the Act have become outdated and are incomplete.

Governors recognize that the Act can only be reauthorized through legislation developed in a consensus fashion that results in broad bipartisan support.

The governors realize this is no easy task. We started a similar debate in the early 90's. As a group we had never experienced a more acrimonious debate - so acrimonious in fact that we had to initially back off our attempt. However, with the leadership of Montana's then-Governor Stan Stephens on one side of the debate and Idaho's then-Governor Cecil Andrus on the other, the Governors became convinced that the only way the Endangered Species Act could be improved was through a consensus process.

Our staff worked with senior representatives of the Fish and Wildlife Service and the National Marine Fisheries Service to improve the Act by drawing on the mutual experience we have gained since 1973 in implementing the Act. That leadership and that consensus resulted in an outstanding proposal which would strengthen the role of the states, streamline the Act, and provide increased certainty and assistance for landowners and water users while at the same time enhancing its conservation objectives.

The consensus has since been endorsed by the Western Governors, the National Governors Association and the 50 state fish and wildlife agencies through their International Association of Fish and Wildlife Agencies. It was forwarded to you first in the form of legislative principles in 1993 and then in legislative language in 1995 and 1997, and most recently in November 1999 when I met with your committee staff.

Governors' Consensus Recommendations

Since consensus on our part was so difficult and hard fought, it is worth a few minutes to outline the

substantive areas contained in our legislative recommendations:

- enhanced authority for State-wide and multi-state Conservation Agreements;
- enhanced state role in implementing the Act;
- increased, stable funding;
- strong incentives for private landowners like Safe Harbor and No Surprises, funding for habitat conservation planning, and technical assistance;
- peer review of listing and delisting decisions;
- designation of critical habitat where appropriate as a part of recovery planning when designation is most sensible and practical;
- greatly enhanced public comment and involvement in all aspects of the Act;
- elevation of the recovery of species to a central focus of the Act and incorporate implementation plans to ensure that recovery plans are not only comprehensive and inclusive in their efforts to conserve species, but also carried out;
- enhanced authority for Multispecies and Distinct Habitat Conservation Plans and Streamlined HCP process for small landowners with small impacts;
- Increased rigor in the listing process and the ability to address multiple species;
- a more rigorous, less costly and more predictable delisting process; and
- reaffirmation of the management distinction between endangered and threatened species.

Major Legislation Before the Resources Committee

Mr. Chairman, we truly appreciate the Committee's effort to address many of the governors' key issues in HR 3160, especially by strengthening the role of the state in the listing and recovery planning processes and by enhancing the Secretary's authority to consider state conservation agreements and voluntary and future conservation actions when making a determination whether or not to list or delist a species.

HR 3160 clearly reflects a close reading of the governors' suggestions. However, in addressing many of these issues, the bill often incorporates concepts that eliminate consensus on the larger issue.

The bill does not address a number of important issues recommended by the governors like short-form habitat conservation plans for small landowners with small impacts, a less costly delisting process, and multispecies and distinct habitat conservation plans.

HR 3160 also addresses many issues and solutions upon which we as governors labored but could find no consensus. Application of section 7 consultation consistent with an agency's primary mission, broad public health and safety exemptions, and limits on an applicant's obligations under an incidental take permit (in Title III) are examples.

In a similar fashion, HR 960, the other major bill before the Committee to comprehensively reauthorize the Act, addresses a number of issues within the governors' consensus like an increased focus on recovery planning and implementation and authority to address clusters of species during the listing and recovery processes. However, HR 960 does not address state role or state conservation agreements. Like the bill before you today, HR 960 also addresses a number of solutions upon which the governors do not have consensus. Performance bonds for habitat conservation plans, application of the Act's protections to proposed and listed species, and interim habitat designation at the time of listing are examples.

The issues and remedies upon which consensus does not exist are of great importance. Each of our

governors is working on these particular issues from the unique perspectives of their states and their needs. However, the governors found inclusion of these issues prevented any chance of obtaining the incentives, the streamlining, and the acknowledgment of partnership upon which bipartisan support exists. Quite frankly, these reforms will bring important relief that is too important to lose while debate rages over the other issues. It is for that reason, that the Western Governors urge the members of the committee to reach across the table to each other in an attempt to develop legislation that can be enacted and signed into law this year.

Important State Provisions in HR 3160

I would now like to discuss in more detail a few of the most important state provisions within HR 3160.

State Conservation Agreements

Preventative conservation is at the heart of the governors' recommendations and that is why our states are actively engaged in developing state and multiple state conservation plans to restore declining species before they need the protections of the Act. The Act directs the Secretary to take into consideration state and local government efforts to protect a species when determining whether or not the species warrants listing (Section 4(b)1(A)).

However, in the last few years the courts have overturned determinations by the Secretary of Commerce and the Secretary of the Interior that conservation plans in Oregon and Texas appropriately addressed the threats to the petitioned species and therefore precluded the need to list them. Most damaging of all, the Oregon case disallowed consideration of voluntary conservation efforts. These voluntary efforts are essential when working with private land owners, and consideration of the positive benefit of conservation actions to be performed in the future. This is especially important to note since the projection of harmful trends into the future is considered when deciding a species is threatened or endangered. With most species spending a majority of their time on private lands, the ruling unfortunately could greatly reduce the nation's ability to conserve species.

Western governors truly appreciate the Committee's effort to protect the use of these essential conservation tools. HR 3160 underlines that federal, state, and local government regulatory and proactive conservation measures are included among the five factors that the Secretary must consider when determining whether or not to list a species. The amendment clarifies that voluntary programs and measures are to be included in the review and adds a new subsection (4 b 1 C) to clarify that a Secretary must consider the future conservation benefits of habitat conservation plans and state conservation agreements upon the species (Section 101, p. 3, p. 4-5). These amendments are critically important if the Act is to be implemented effectively.

While awaiting legislative action on this issue, the governors have asked the two services to develop guidelines which states and courts could consult when trying to determine whether or not future and voluntary conservation actions are effective elements of a conservation agreement. We were pleased to learn that the services intend to issue such guidance (called PECE-Policy for the Evaluation of Conservation Efforts When Making Listing Decisions) in the near future.

The governors would like the Committee to consider a provision which delineates state-initiated conservation agreements. It could be modeled on the governors' legislative proposal. It would address the need to extend the deadline for acting on a state conservation agreement if the Secretary determined that

within 120 days a state's efforts and good faith progress would result in completion of the conservation agreement. It would also provide an incentive for a state to go out in front of the listing process and conserve species when the costs are the lowest they will ever be and the flexibility to make important land management decisions is the highest. The provision would allow a listing to proceed, but suspend the effects of the listing within a state for those actions and parties that are in compliance with a state conservation agreement that the Secretary has found effectively conserves the species.

State Participation in Listing Process

Distrust in the appropriateness of listing decisions has divided communities and weakened support for the ESA. While the Act requires the Secretary to cooperate to the maximum extent practicable with the states, states have had only minor participation in listing and delisting decisions. Yet much of the information upon which listing decisions are based derives from state expertise and other institutional resources, such as mapping capabilities and biological inventories.

We believe the services recognize the value and leverage created when states and local interests work on their own to develop and implement conservation efforts. In many cases, significant historical declines in species occurred years ago. Ongoing efforts to reverse these trends take time with or without ESA protection.

Unfortunately, the Services have limited ability to recognize these state conservation efforts. Either the time to develop them is too short under the legislatively defined listing deadlines or the regulatory flexibility is lacking to achieve over large landscapes.

Consider the recent decision on prairie dogs. Eleven states are involved in a multi-state conservation plan. In Montana, we actually have a state specific plan which we were working on prior to the petition for listing.

The USFWS had two real choices, to list or not to list. Instead they chose warranted but precluded, in essence saying we should list, but we have more important things to do. It buys time for states to implement their plans. We appreciate the opportunity.

What if they did not have other more important things to do? Clearly, you need to give them another choice in the listing process. There would be a required listing of a species with millions of individuals spread over those 11 states. The services and their partners would be forced to spend millions of dollars while clearly more threatened and endangered species conservation efforts go begging. A choice that allows for suspension of a listing decision if the conservation efforts are leading toward an acceptable recovery of the species and control of the threats which are leading to the decline.

The Secretary could, in essence keep the hammer represented by an ESA listing in plain view while using the carrot of state and local leadership to achieve conservation. This will not work for all species in all cases, yet increasingly, the listing of species whose range covers many states and involves significant private land must be approached in new ways. Further, this would allow for addressing multiple species needs in particular habitats rather than the narrow single-species approach called for under the ESA.

A key recommendation of the Governors has been that affected states formally comment on listing decisions in a meaningful manner. This would provide an automatic form of peer review. However, if the state disagrees with the Secretary's determination that a listing is warranted, formal peer review would be

triggered. Should the review panel concur with the state's recommendation, the Secretary could still proceed with the listing, but only upon a finding by a preponderance of the evidence (WGA section 4). The governors refined this approach with the Administration and obtained its support. The Secretaries of the Interior and Commerce mentioned such an approach to Congress in their 1995 10 Guideposts for Improved Implementation of the ESA.

HR 3160 elaborates on this approach in four ways. It requires the Secretary to share valid petitions with affected governors and tribes and provides them with 90 days to respond. A thirty day peer review is triggered if a governor finds that the petition does not warrant proceeding (Section 101, p. 9). Secondly, affected governors and tribes also may submit information on whether a 12 month draft determination is warranted. That determination can not take effect within the state or tribal area without showing by a preponderance of scientific evidence that the information that they submitted is incorrect and the determination is warranted (p. 17). Thirdly, a final determination can not be made if a governor is in disagreement until the Secretary has consulted with the President and provided the governor with a written explanation (Section 105, p. 32). Finally, any final finding that a listing is warranted is subject to judicial review in which the court must rule that the finding is supported by a preponderance of the evidence. The provision (Section 104, p 32) requires this to be a *de novo* review, meaning that the listing agency is denied a presumption in favor of its expertise.

The governors' recommendation on this subject was misunderstood by many as delaying the listing decision, which was not our intent. The Committee's language more clearly defines the time period for state and peer review. However, the complexity of this series of provisions and the broader use of the preponderance of evidence standard as a threshold for listing decisions may cause reviewers to still see the approach as a delaying tactic and, in fact, the broadening of this provision might not have the consensus among the governors.

State Role in Implementing the Act

States possess broad trustee and police powers over fish and wildlife within their borders, including those species found on most federal lands within their borders. With the exception of marine mammals, states retain concurrent jurisdiction even where Congress has limited state authority, as is the case of endangered species. The Act can be effectively implemented only through a full partnership between the states and federal government in which states participate in a meaningful manner in all aspects of the Act, ranging from species surveys to development of habitat conservation plans.

One way to accomplish this partnership is through the delegation of authority for the development of conservation and recovery plans by states that accept delegation and agree with the Secretary to perform in accordance with specified standards. A federal-state collaborative rulemaking process should be established to determine the standards and guidelines for state participation in or assumption of authority for decisions under the Act, while recognizing that the Secretary retains final decision making authority (WGA section 2b, p. 1).

In addressing this goal, HR 3160 provides the Secretary with the authority to delegate recovery planning to the states and to issue in cooperation with the states the standards and guidelines for state delegation (Section 401, p. 75). The bill also directs the Secretary to develop in cooperation with the state agency guidelines to ensure that cooperation with the states in listing and delisting activities is achieved efficiently and effectively (Section 107, p. 34). The bill also directs the Secretary to act in cooperation with the states in providing grants for safe harbor agreements (Section 304, p. 59).

Governors recommend that the Committee define the phrase "in cooperation with the states" to mean a collaborative rulemaking process established by the Secretary in which states, as administrative and regulatory partners, participate in a meaningful and timely manner in the development of standards, guidelines, and regulations that implement the provisions of the Act and which integrate state recommendations, field practices, and programs. We would then recommend inserting that phrase in all of the major sections of the Act.

Funding

Inadequate funding has been a central weakness of the Act since shortly after its enactment. Lack of basic program funding leads to the highway construction bottlenecks in Montana that I mentioned in the opening of my testimony and to Northwest communities and citizens not receiving the technical assistance they desperately need to go on with their day-to-day activities.

Funding is also desperately needed to enable states, land owners and their partners to

cooperatively restore declining species on a landscape scale like the coastal plains, the prairies, or the sagebrush steppes where large numbers of species are being individually proposed for listing. In this area, funding is needed for site specific research, landowner incentives, and multistate coordination to restore the prairie dog, the lesser prairie chicken and other upland birds before the costly restrictions of the Act are imposed.

It is in this area, Mr. Chairman, that the governors especially want to thank you and the members of your committee for reporting HR 701, The Conservation and Reinvestment Act (CARA). Once enacted, it will provide $350 million annually to our states for wildlife conservation and education. It also will provide $150 million annually for landowner incentives and conservation easements for endangered and threatened species.

Conclusion

The number and geographic range of listings continues to grow in the West, encompassing major metropolitan areas, public lands, and private forest and farmlands, while the Act remains underfunded and without the tools necessary to enable private landowners and states to be partners in achieving the goals of the Act. Our states desperately need the Act to be reauthorized.

States are vitally interested in maintaining viable programs for the conservation of fish and wildlife that are largely under our jurisdiction. We are committed to success and expect to be held accountable, but only if we are given the proper tools and adequate resources to do the job. Under the existing Act, listing means these species largely become a federal responsibility.

We urge you to work through consensus to give us the tools to help us achieve conservation success in cooperation with our private landowners that builds on their stewardship ethic for these resources.

Mr. Chairman, once again, we encourage the members of the Resource Committee to take up reauthorization of the ESA in the same bipartisan fashion that you worked through your differences with the CARA legislation. With that in mind, the governors would be pleased to provide a state technical team to assist the Committee.

Thank you very much for the opportunity to give these brief comments on behalf of the Western Governors. I would be very pleased to answer any questions or discuss with you any particulars about my testimony this morning.

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